

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 30, 1997

CANTERBURY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. Penn 97-113-R
	:	
SECRETARY OF LABOR,	:	Citation No. 4174654; 3/20/97
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Dianne Mine
Respondent	:	Mine ID 36-05708

## DECISION

Appearances: Joseph A. Yuhas, Esq., 1809 Chestnut Ave., Barnesboro, Pennsylvania, for Contestant;  
Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

This Contest Proceeding is before me upon the Notice of Contest filed by Canterbury Coal Company (Canterbury) under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act," to challenge Citation No. 4174654, issued by the Secretary for one violation of the standard at 30 C.F.R. ' 90.102(a). The citation charges as follows:

On August 28, 1996, an employee at the subject mine exercised his rights afforded under Title 30, Code of Federal Regulations, Part 90. The employee stayed on the same shift rotation while the operator sampled him to determine compliance. When compliance could not be met, the miner was transferred to another job, which changed his shift rotation which was different before the transfer.

The cited standard, 30 C.F.R. ' 90.102(a) provides in relevant part as follows:

Whenever a Part 90 miner is transferred in order to meet the respirable dust standard in ' 90.100 (Respirable dust standard) . . . the operator shall transfer the miner to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer. The operator may transfer a Part 90 miner to a different coal mine, a newly-created position or a position on a different shift or shift rotation if the miner agrees in writing to the transfer.

It is undisputed that the subject miner, Russel Bollenger, was adjudged by the Secretary on August 5, 1996, to be eligible to be classified as a "Part 90" miner (Government Exhibit No. 1). As explained in a letter from the Secretary's representative, Bollenger's x-rays showed that he had "enough coal worker's pneumoconiosis (black lung) to be eligible for the option to work in a low dust area of a mine" (Government Exhibit No. 1). As the letter further explained, Bollenger had the "right to work at a job in the mine where the concentration of dust is not more than 1.0 milligram per cubic meter of air." The "Part 90" miner's rights are set forth in 30 C.F.R. '90.3(a) as follows:

Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis based on a chest x-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligram per cubic meter of air. Each of these miners shall be notified in writing of eligibility to exercise the option.

The standard at 30 C.F.R. '90.100 sets forth the obligations of the mine operator upon notification that a Part 90 miner is employed at its mine. That standard reads as follows:

After the twentieth calendar day following receipt of notification from MSHA that a Part 90 miner is employed at the mine, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner in the active workings of the mine is exposed at or below 1.0 milligram per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with '90.206(Approved sampling devices; equivalent concentrations).

The Commission, in *Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, Local 1468, District 30, United Mine Workers of America and International Union, United Mine Workers of America*, 9 FMSHRC 891, 897 (May 1987), summarized the requirements of Part 90 as follows:

[t]he Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained . . .; (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly-created position or a position on a different shift or shift rotation" . . .; and (3) at no less than the regular rate

of pay earned by the miner immediately before exercise of the transfer option

. . . It is the duty of the operators to effectuate these rights as applicable with respect to their Part 90 miners.

Upon notification of Bollenger's status as a Part 90 miner, Canterbury made several efforts to reassign Bollenger to positions meeting the requirements of 30 C.F.R. '90.102(a). However, following respirable dust sampling, each position was found to exceed the "1.0 milligram per cubic meter of air" standard. Canterbury finally transferred Bollenger to the position of shuttle car operator on a different shift rotation. Bollenger did not consent to this transfer pursuant to 30 C.F.R. '90.102(a) and the instant citation was accordingly issued for a violation of that standard.

The provisions of 30 C.F.R. '90.102(a) are clear and unambiguous and Canterbury's transfer of Bollenger to a different shift rotation without his consent was in violation of that standard. Canterbury argues that since it did not have an "existing position" for Bollinger, in order to keep Bollenger on his same shift rotation and at the same time not exceed the 1.0 milligram per cubic meter of air dust exposure limits it would be necessary to create a new job position C C something that the law does not require. Canterbury misreads the requirements of the law. Its ultimate responsibility to a "Part 90" miner is to provide a workplace for such a miner in which the average dust exposure of 1.0 milligram per cubic meter of air is not exceeded. It can do this by reducing the level of respirable dust in the miner's existing position or in a number of other ways as set forth in the regulations. However, one thing the operator clearly cannot do is transfer a miner in Bollinger's situation to a different shift rotation without his written consent.

Under the circumstances the violation is proven as charged, Citation No. 4174654 is affirmed and this Contest Proceeding is dismissed.

Gary Melick  
Administrative Law Judge  
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